84-1607

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTH EAST INDEPENDENT SCHOOL DISTRICT
and R.E. WINDHAM,

Petitioners,

v.

CHARLES FINDEISEN,

Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

RALPH G. LANGLEY*
WILLIAM T. ARMSTRONG III
FOSTER, LEWIS, LANGLEY, GARDNER
& BANACK, INCORPORATED
Sixteenth Floor
Frost Bank Tower
San Antonio, Texas 78205
(512) 226-3116

Attorneys for Petitioner
**Counsel of Record*

PRESS OF I

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QUESTIONS PRESENTED

Does a teacher that resigned under a threat of termination possess a cause of action under 42 U.S.C. § 1983 (1979) because he was denied a pretermination hearing even though state law would have required such a hearing if the teacher had refused to resign?

Does a teacher that resigned in reliance upon his employer's subsequently broken promise of a future job assignment, possess a cause of action under 42 U.S.C. § 1983 (1979) because he was denied a pretermination hearing even though state contract law provides the teacher with post-termination remedies and procedures?

Should the scope of *Board of Regents v. Roth*, 408 U.S. 564 (1972) be reexamined and narrowed in light of *Parratt v. Taylor*, 451 U.S. 527 (1981)?

CERTIFICATE OF INTERESTED PERSONS

The Undersigned, Counsel of Record for Petitioners, NORTH EAST INDEPENDENT SCHOOL DISTRICT and R. E. WINDHAM, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13.6.1:

NORTH EAST INDEPENDENT SCHOOL DISTRICT and R. E. WINDHAM ..... *Petitioners*

CHARLES FINDEISEN ..... *Respondent*

DATED: March 22, 1985
San Antonio, Texas

WILLIAM T. ARMSTRONG III
FOSTER, LEWIS, LANGLEY,
GARDNER & BANACK,
INCORPORATED
Sixteenth Floor
Frost Bank Tower
San Antonio, Texas 78205
(512) 226-3116

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IN THE

Supreme Court of the United States

OCTOBER, 1984

No. _____

NORTH EAST INDEPENDENT SCHOOL DISTRICT and R. E. WINDHAM,

Petitioners

VS.

CHARLES FINDEISEN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NORTH EAST INDEPENDENT SCHOOL DISTRICT and R. E. WINDHAM, the Petitioners herein, pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals, For the Fifth Circuit, entered in the above entitled and numbered cause on December 26, 1984.

OPINIONS BELOW

The December 26, 1984 Opinion of the United States Court of Appeals For The Fifth Circuit is reported at 749 F.2d 234. It is printed in Appendix "A" hereto, pages A2–A14. The Judgment of the United States Court of Appeals For The Fifth Circuit was entered on December 26, 1984. A copy of such Judgment is printed in Appendix "A", pages A15–A16. Appellees' Petition for Rehearing was denied on January 23, 1985. A copy of such Order is printed in Appendix "A" hereto, page A-17.

The Judgment of JUDGE FRED SHANNON, United States District Court for the Western District of Texas, San Antonio Division, is printed in Appendix "A" at page A-1.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on December 26, 1984. The Motion For Rehearing was denied on January 23, 1985. The Jurisdiction of the Supreme Court is invoked under and pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C., § 1983 (1979), which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TEX.EDUC.CODE ANN., § 13.109 (1972), which provides as follows:

> Any teacher, whether employed under a probationary contract or a continuing contract, may be discharged during the school year for one or more of the following reasons, which shall constitute lawful cause for discharge:

(1) immorality;

(2) conviction of any felony or other crime involving moral turpitude;

(3) drunkenness;

(4) repeated failure to comply with official directives and established school board policy;

(5) physical or mental incapacity preventing performance of the contract of employment; and

(6) repeated and continuing neglect of duties.

TEX.EDUC.CODE ANN., § 13.111 (1972), which provides as follows:

(a) Before any teacher shall be discharged during the year for any of the causes mentioned in Section 13.109 of this code, or before any probationary contract teacher shall be dismissed at the end of a school year before the end of the term fixed in his contract, or before any teacher holding a continuing contract shall be dismissed or returned to probationary contract status at the end of a school year for any of the reasons mentioned in Section 13.110 of this code, he shall be notified in writing by the board of trustees or under its direction of the proposed action and of the grounds assigned therefor.

(b) In the event the grounds for the proposed action relate to the inability or failure of the teacher to perform his assigned duties, the action shall be based upon the written recommendation by the superintendent of schools, filed with the board of trustees. Any teacher so discharged or dismissed or returned to probationary contract status shall be entitled, as a matter of right, to a copy of each and every evaluation report, or any other

memorandum in writing which has been made touching or concerning the fitness or conduct of such teacher, by requesting in writing a copy of the same.

TEX.EDUC.CODE ANN., § 13.112 (1972),[1] which provided as follows:

(a) If, upon written notification of the proposed action, the teacher desires to contest the same, he shall notify the board of trustees in writing within 10 days after the date of receipt by him of the official notice above prescribed, of his desire to be heard, and he shall be given a public hearing if he wishes or if the board of trustees determines that a public hearing is necessary in the public interest.

(b) Upon any charges based upon grounds of inefficiency, or inability or failure of the teacher to perform his assigned duties, the board of trustees may in its discretion establish a committee of class room teachers and administrators, and the teacher may request a hearing before this committee prior to hearing of the matter by the board of trustees.

(c) Within 10 days after request for hearing made by the teacher, the board of trustees shall fix a time and place of hearing, which shall be held before the proposed action shall be effective. Such hearing shall be public unless the teacher requests in writing that it be private.

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[1]In 1984, subsequent to FINDEISEN's resignation, subsection (e) was added to § 13.112. It provides as follows:

"(e) The board shall take such action as it deems lawful and appropriate and shall notify the teacher in writing of that action within 15 days following the conclusion of the hearing."

> (d) At such hearing, the teacher may employ counsel, if desired, and shall have the right to hear the evidence upon which the charges are based, to cross-examine all adverse witnesses, and to present evidence in opposition thereto, or in extenuation.

TEX.EDUC.CODE ANN., § 13.114 (1972), which provides as follows:

> If the teacher upon notification of any such proposed action fails to request a hearing within 10 days thereafter, or after a hearing as hereinabove provided, the board of trustees shall take such action and shall enter such order as it deems lawful and appropriate. If the teacher is reinstated, he shall immediately be paid any compensation withheld during any period of suspension without pay. No order adverse to the teacher shall be entered except upon majority vote of the full membership of the board of trustees.

TEX.EDUC.CODE ANN., § 13.115 (1972),[2] which provided as follows:

> (a) If the board of trustees shall order the teacher discharged during the school year under Section 13.109 of this code, the teacher shall have the right to appeal such action to the commissioner of education, for review by him, provided notice of such appeal is filed with the board of trustees and a copy thereof mailed to the

---

[2]In 1984, subsequent to FINDEISEN's resignation, subsections (c) and (d) of § 13.115 were amended to read as follows:

> "(c) Either party to an appeal to the commissioner shall have the right to appeal from his decision to a District Court in Travis County.
>
> (d) Deleted by Acts 1984, 68th Leg., 2nd C.S., p. 302, ch. 28, art. I, part D, § 5, eff. Sept. 1, 1984."

commissioner within 15 days after written notice of the action taken by the board of trustees shall be given to the teacher; or, the teacher may challenge the legality of such action by suit brought in the district court of any county in which such school district lies within 30 days after such notice of the action taken by the board of trustees has been given to the teacher.

(b) If the board of trustees shall order the continuing contract status of any teacher holding such a contract abrogated at the end of any school year and such teacher returned to probationary contract status, or if the board of trustees shall order that any teacher holding a continuing contract be dismissed at the end of the school year, or that any teacher holding a probationary contract shall be dismissed at the end of a school year before the end of the employment period covered by such probationary contract, the teacher affected by such order, after filing notice of appeal with the board of trustees, may appeal to the commissioner of education by mailing a copy of the notice of appeal to the commissioner within 15 days after written notice of the action taken by the board of trustees has been given to the teacher.

(c) Either party to an appeal to the commissioner shall have the right to appeal from his decision to the State Board of Education, according to the procedures prescribed by the State Board of Education. The decision of the State Board of Education shall be final on all questions of fact, but shall be subject to appeal to the district court of any county in which such school district or portion thereof lies, if the decision of the state board:

(1) is not supported in the record by substantial evidence;

(2) is arbitrary or capricious; or

(3) is in error in the application of existing law to the facts of the case.

(d) Trial procedure in the district court shall be the same as that accorded other civil cases on the docket of said court, with the decision of the trial court to be subject to the same rights of appeal under the Texas Rules of Civil Procedure as is accorded other civil cases so tried.

TEX.EDUC.CODE ANN., § 13.116 (1972), which provides in pertinent part as follows:

(a) Any teacher holding a continuing contract with any school district, or holding a probationary contract with an unexpired term continuing through the ensuing school year, may relinquish the position and leave the employment of the district at the end of any school year without penalty by written resignation addressed to and filed with the board of trustees prior to August 1, preceding the end of the school year that the resignation is to be effective. A written resignation mailed by prepaid certified or registered mail to the superintendent of schools of the district at the post office address of the district shall be considered filed at time of mailing.

(b) Any teacher holding a continuing contract or such unfulfilled probationary contract may resign, with the consent of the board of trustees of the employing school district, at any other time mutually agreeable.

* * *

STATEMENT OF THE CASE

CHARLES FINDEISEN, Respondent, brought suit in federal court under 42 U.S.C. § 1983 (1979), alleging that

his employment relationship with the NORTH EAST INDEPENDENT SCHOOL DISTRICT (NEISD or Petitioner), was severed without his being afforded his constitutional right of procedural due process. FINDEISEN was a tenured teacher with NEISD for the 1980-81 school year. During the preceding school year, he had been a high school science teacher at Churchill High School. At the beginning of the 1980-81 school year, FINDEISEN was transferred to a science teaching position at Garner Middle School. He challenged this transfer because he wanted to remain a teacher at the high school level. His appeal was unsuccessful.

To satisfy FINDEISEN's desire to be at Churchill High School, he was transferred back to Churchill High School to teach math on January 19, 1981. The transfer back to Churchill High School was done with FINDEISEN's approval. In order to teach the subject of math at the high school level, however, FINDEISEN needed a temporary teaching certificate from the Texas Education Agency. NEISD assisted him in obtaining this certificate. Under the terms of this certificate, FINDEISEN was required to complete six semester hours of math by August 31, 1981 in order to have the certificate renewed for the next school year.

To meet these requirements, FINDEISEN enrolled in a six-hour math course during the summer of 1981. On July 29, 1981, FINDEISEN withdrew from the math course. Later in the summer, he notified NEISD and its Personnel Director, WINDHAM, of his failure to complete the required course.

According to FINDEISEN's version of the facts, MR. WINDHAM, the Personnel Director for NEISD, upon being told of the withdrawal, threatened to terminate

FINDEISEN unless FINDEISEN notified WINDHAM, in writing, that (1) FINDEISEN had not completed the six hours of math, (2) requested placement into a science position, if one was open, and (3) if no science position was open, the letter could be considered his resignation.

By letter dated August 19, 1982, FINDEISEN notified Windham:

> "This memo is to confirm that I have not completed six hours of math. I request placement into a science teaching position should one become available in the district. If no position becomes available you may consider this my resignation."

(Pre-Trial Order, page 5, paragraph o).

Upon receipt of the letter, WINDHAM notified FINDEISEN by letter dated August 24, 1982:

> "This is to acknowledge receipt of your letter of resignation as a math teacher dated August 19. We will recommend to the Board of Trustees that it be accepted effective with the end of the 1980-81 school year, May 30."

(Pre-Trial Order, page 5, paragraph p).

FINDEISEN alleged that after the resignation was accepted by WINDHAM, certain science teaching positions came open to which he was not assigned. He brought suit against NEISD and WINDHAM under 42 U.S.C. § 1983 (1979), alleging that he had been denied a property right without due process of law.

THE RULINGS BELOW

Under the above facts as plead by FINDEISEN, developed in discovery, and agreed to in the pretrial order, the trial court granted NEISD and WINDHAM a summary

judgment. In their motion for summary judgment, defendants urged that *Parratt v. Taylor*, 451 U.S. 527 (1981), did not require a full due process hearing under the facts of the case.

The trial court's summary judgment stated:

> "Summary Judgment in favor of Defendants is granted. The Courts of the State of Texas provide full and due process for Plaintiff's breach of contract claim herein."

The Fifth Circuit reversed and remanded the case for trial on the merits. The circuit court held that Plaintiff's allegations that his resignation was coerced by either, or both, a threat of termination and, by a subsequently broken promise to give him a science position, stated a claim of a constructive discharge and this, in turn, required a procedurally correct pretermination hearing. The Fifth Circuit relied upon *Board of Regents v. Roth*, 408 U.S. 564 (1972) in requiring the hearing and failed to recognize any limitation on that holding by *Parratt v. Taylor*, 451 U.S. 527 (1981).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion equated a resignation tendered under a threat of termination with a constructive discharge entitling the teacher to a hearing. This is in direct conflict with the Seventh Circuit's opinion in *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir. 1982) *cert. denied* 459 U.S. 1017 (1982). The Fifth Circuit's opinion also failed to recognize that when a teacher resigns, even if based on a promise that is subsequently broken, a predeprivation due process hearing is unrealistic and impractical. Such impracticality is one of the reasons specifically recognized in *Parratt v. Taylor*, 451 U.S. 527, 540-541 (1981), for not requiring a predeprivation hearing in all claims of loss of a property right

without due process. Additionally, the Fifth Circuit incorrectly viewed FINDEISEN's claim that his resignation was the result of a false promise by NEISD as requiring a pretermination hearing. Correctly analyzed, however, FINDEISEN was alleging a breach of an oral employment agreement by the NEISD. Breaches of employment agreements with teachers do not give rise to a federal civil rights action simply because the employer is a governmental entity. *Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983). Finally, the Fifth Circuit's opinion holds that *Parratt v. Taylor, supra*, makes no limitation on the holdings of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindeimann*, 408 U.S. 593 (1972). The correctness of that decision is in doubt in light of this court's failure to resolve that issue in *Vail v. Board of Education of Paris Union School District No. 95*, ____ U.S. ____, 104 S.Ct. 2144 (1984).

In the case at bar, Judge Politz incorrectly equates a resignation tendered under a threat of termination as being a constructive discharge for which a hearing should have been held under *Board of Regents v. Roth*, 408 U.S. 564 (1972). The court of appeals ignored the fact that if FINDEISEN had refused to resign and had forced the school district to terminate him, he would have been afforded the full procedural protections of notice and a hearing provided continuing contract teachers under Texas law. *See*, TEX.EDUC.CODE ANN. § 13.101 et.seq. (Supp. 1984). It was FINDEISEN's decision to resign that prevented him from receiving a hearing and not the decision of NEISD or WINDHAM.

The Seventh Circuit faced a similar situation in *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir. 1982), *cert. denied* 459 U.S. 1017 (1982), and found that a school employee was not entitled to a due process hearing when that employee accepted a leave of absence rather than face a termination

hearing with all its procedural safeguards. In denying the teacher's claim, the court stated:

> "Dusanek contends that the March 29 letter compelled him to take a leave of absence. The availability of recourse to a constitutionally sufficient administrative producure [sic] satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure. . . . These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather, they express the logical proposition that a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. Because the procedural protection existed, the state cannot be accused of withholding them in a section 1983 suit. (Citations omitted)."

The Fifth's Circuit's opinion, in the case at bar, also emphasized the opportunity that existed for a pretermination hearing as a reason for removing it from the scope of the holding in *Parratt v. Taylor*, 451 U.S. 527 (1981). The circuit court, however, failed to explain the feasibility of a pretermination hearing in a resignation situation. Resignations are either accepted or rejected. They are not the subject of procedurally correct hearings. Many resignations in public employment are obtained under the threat of termination. Such resignations benefit both parties in that the employer avoids the acrimony of a full blown hearing and the employee avoids the fact that he was terminated from becoming a chapter in his job history. The employee is not deprived of any right to notice or a hearing except by his own decision. The holding of the Fifth Circuit in this case, places the legality of acceptance of any such resignation in doubt if the employee is later permitted a federal civil rights trial simply

by alleging that his resignation was coerced or the result of some misunderstanding between the parties.

A second factor upon which the Fifth Circuit relied was FINDEISEN's allegation that he had resigned based upon NEISD's promise that he would be placed in an available science position, if one existed, and that that promise was not kept. Assuming *arguendo*, that his allegation was correct, it does not state a procedural due process violation, but only a claim of breach of contract. If tried, the issue to be decided by the trial court would be did NEISD make the promise alleged by FINDEISEN and, if so, did it break that promise. Such contract disputes should not be converted into federal civil rights actions simply because one of the actors is a governmental entity. The fear of converting every tort committed by a governmental entity or official into a federal civil rights action that was expressed by Justices Rehnquist and Stewart in *Parratt v. Taylor*, 451 U.S. 527, 544 (1981), is even more applicable to breach of contract situations. *Casey v. Depetrillo*, 697 F.2d 22,23 (1st Cir. 1983), adopted this view of *Parratt* in holding that a "mere breach of contractual right is not a deprivation of property without *constitutional* due process of law . . . Otherwise, virtually every controversy involving an alleged breach of contract by a government or a governmental institution would be a constitutional case."

Under Texas law, FINDEISEN enjoyed statutory rights to a pretermination due process hearing under TEX.EDUC.CODE ANN. §§ 13.111, 13.112 (1972). Further, if NEISD did break any promise, FINDEISEN was entitled to relief in the state courts for breach of a contract. In other words, due process procedures to hear FINDEISEN's claim were in place for him to use both before and after his resignation. Because he resigned, however, there was no opportunity to have a pretermination hearing. He

still possesses the right to bring suit in state court, but instead has sought to transform his claim of a broken promise into a federal civil rights action.

Board of Regents v. Roth, 408 U.S. 564 (1972) and *Perry v. Sindeimann*, 408 U.S. 593 (1972) should be reexamined in light of *Parratt v. Taylor*, 451 U.S. 527 (1981). A due process hearing in teacher termination cases should only be constitutionally required and thereby give rise to a 42 U.S.C. § 1983 action, in those instances (1) in which there is no available post-deprivation state remedy, or (2) in which a teacher's reputation or protected constitutional activities are involved. The basis for this argument is contained in Judge Posner's dissent in *Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435, 1449 (7th Cir. 1983), affirmed by an equally divided court ____ U.S. ____, 104 S.Ct. 2144 (1984). Even if this Court declines to limit *Board of Regents v. Roth*, to the extent suggested by Judge Posner, the Court should at least remove "resignation" situations from the scope of *Roth*.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the judgment of the Fifth Circuit Court be reversed and the judgment of the trial court be affirmed.

Respectfully submitted,

WILLIAM T. ARMSTRONG III
FOSTER, LEWIS, LANGLEY,
GARDNER & BANACK,
INCORPORATED
Sixteenth Floor
Frost Bank Tower
San Antonio, Texas 78205
(512) 226-3116

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Appellees' Petition for Certiorari has been forwarded by Certified Mail, Return Receipt Requested, to Ms. Catherine Quinones, 6243 I.H. 10, Suite 555, San Antonio, Texas 78201, on this the 26th day of March, 1985.

William T. Armstrong

WILLIAM T. ARMSTRONG III

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHARLES FINDEISEN

VS.

NORTH EAST INDEPENDENT SCHOOL DISTRICT AND
R. E. WINDHAM

SA-82-CA-470

FILED
July 27, 1983
Charles W. Wagner, clerk

SUMMARY JUDGMENT FOR DEFENDANT

Summary Judgment in favor of Defendants is granted. The Courts of the State of Texas provide full and due process for Plaintiff's breach of contract claim herein.

The case is dismissed with prejudice at Plaintiff's cost.

IT IS SO ORDERED.

Signed this 27th day of July, 1983.

Fred Shannon,
United States District Judge

CHARLES FINDEISEN,
Plaintiff-Appellant,

v.

NORTH EAST INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

No. 83—1609.

United States Court of Appeals, Fifth Circuit.
Dec. 26, 1984.

Former tenured school teacher brought section 1983 action against school district, alleging a constructive discharge. The United States District Court for the Western District of Texas, Fred Shannon, J., granted school district's motion for summary judgment, and teacher appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) the tenured teacher had a property right in his continued employment; (2) the tenured teacher was entitled to timely notice and opportunity to answer charges before being discharged; anad (3) several genuine issues of fact existed which were material to the constructive discharge claim, precluding summary judgment.

Vacated and remanded.

Garwood, Circuit Judge, filed concurring opinion.

Catherine Quinones, San Antonio, Tex., for plaintiff-appellant.

Foster, Lewis, Langley, Gardner & Banack, Inc., William T. Armstrong, III, San Antonio, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before POLITZ, WILLIAMS AND GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:

Charles Findeisen filed suit under 42 U.S.C. § 1983 against his former employer, the North East Independent School District (NEISD), alleging a constructive discharge from his position as a tenured school teacher. Claiming a denial of due process, Findeisen contends that he was entitled to a pretermination administrative hearing and an opportunity to challenge and answer any charges made against him. The district court granted NEISD's motion for summary judgment, noting only that "the courts of the State of Texas provide full and due process for plaintiff's breach of contract claim herein." Concluding that Findeisen has alleged a cause of action cognizable under § 1983 and that the record reflects several disputed issues of material fact, we vacate the summary judgment and remand for further proceedings.

FACTS

We glean the following facts from the limited record before us. In 1977 Findeisen was hired by NEISD and assigned to teach science at Churchill High School. He then held a Texas Teacher Certificate in science composite, physical science, biology and chemistry. By April 1980 Findeisen had a continuing contract, the effective equivalent of a tenured position.[1]

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[1]Tex.Educ.Code Ann.§ 13.107 provides:

Each teacher with whom a continuing contract has been made as herein provided shall be entitled to continue in his position or a position with the school district, at a salary authorized by the board of trustees of said district complying with the minimum salary provisions of the foundation aid law, for future school years without the necessity for annual nomination or reappointment, until such time as the person:

(1) resigns, or retires under the teacher retirement system;

(2) is released from employment by the school district at the end of a school year because of necessary reduction of personnel as herein defined;

(3) is discharged for lawful cause, as defined in Section 13.109 of this code and in accordance with the procedures hereinafter provided;

(4) is dismissed at the end of a school year for any reason as set out in Section 13.110 of this code and pursuant to the procedures hereinafter provided in such cases; or

(5) is returned to probationary status, as authorized in Section 13.110 of this code.

In September 1980, NEISD transferred Findeisen from Churchill High School to Garner Middle School with teaching assignments in both science and math. Preferring to teach science exclusively at a high school level, Findeisen filed a grievance which proved unsuccessful at three successive procedural stages. At the final stage, Findeisen claimed that NEISD representatives promised him a science position at Churchill High as soon as practical, and gave him assurances of a notification of any science position vacancy in any of the district's senior high schools.

On January 19, 1981, NEISD transferred Findeisen from Garner Middle School to the math department at Churchill High. Because Findeisen was not certified to teach math, NEISD had to obtain a Temporary Classroom Assignment Permit which authorized Findeisen to teach math at Churchill High for the remainder of the 1980-81 school year. NEISD's personnel director informed Findeisen that employment at Churchill High for the 1981-82 term would be contingent on his successful completion during the summer of six semester hours of math courses, credits required for renewal of the Temporary Permit. Findeisen was to notify NEISD of his efforts. The personnel director purportedly also advised Findeisen that if the math credits were not secured NEISD would assign him to a science position somewhere within the district.

In mid-June 1981 the principal of Wood Middle School invited Findeisen to interview for a science position. At that time Findeisen was a math teacher at Churchill High and declined the invitation. Findeisen thereafter enrolled in two math courses at San Antonio College but voluntarily withdrew on July 29, 1981 for personal reasons.

On August 19, 1981 Findeisen dispatched the following memorandum to the NEISD personnel director:

> This memo is to confirm that I have not completed six hours of math. I request placement into a science teaching position should one become available in the district. If no

> position becomes available you may consider this my resignation.

Of even date the personnel director responded:

> This is to acknowledge receipt of your letter of resignation as a math teacher dated August 19. We will recommend to the Board of Trustees that is be accepted effective with the end of the 1980-81 school year, May 30. If a science position opens in the District, we will consider you along with other applicants.

On September 10, 1981, the NEISD Trustees formally accepted Findeisen's resignation.

It appears that NEISD did not offer Findeisen a science position although at least one vacancy occurred between August 19, 1981 and September 10, 1981. Sometime during the fall of 1981 Findeisen requested an administrative hearing before the Board of Trustees. The request was denied.

Findeisen contends that his August 19, 1981 memorandum was a contingent resignation which was submitted in return for the personnel director's promise of the next available science position. Findeisen maintains that the personnel director threatened a discharge if he failed to submit the contingent resignation. He further contends that a high-ranking NEISD official assured him the NEISD always considered teachers within the system before hiring outsiders but that this was not done with respect to the opening occuring after the tender of his contingent resignation. In sum, Findeisen contends that his resignation was coerced and that considering the totality of the circumstances, his contingent resignation was tantamount to a constructive discharge from his position as a tenured teacher.

ANALYSIS

The threshold consideration, in light of the trial court's abbreviated reasons for decision, is whether Findeisen has stated a procedural due process claim under § 1983, particularly in light of the Supreme Court's teachings in *Parratt v. Taylor*, 451

U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Specifically, has Findeisen alleged a deprivation under color of state law, of a federally protected property right, sans due process?

It seems nigh unto superfluous to remind that § 1983, in conjunction with its jurisdictional counterpart, 28 U.S.C. § 1343(3), provides a federal civil remedy in federal court for violations, under color of state law, of the rights, privileges and immunities secured by the Constitution and laws of the United States. The statute extends protection to all rights guaranteed by the fourteenth amendment. *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 33. S.Ct. 312, 57 L.Ed. 510 (1913). Section 1983 provides an independent federal remedy "regardless of the availability of an adequate remedy under state law," *Brantley v. Surles*, 718 F.2d 1354, 1958 (5th Cir. 1983), *citing Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), in which the Supreme Court stated:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is involved.

Accordingly, the fact that a state actor's acts may be remedied by recourse to state law does not negate the availability of the § 1983 remedy, provided the victim alleges and proves a violation, under color of state law, of a federally protected right.

Whether Findeisen has alleged a cognizable violation of his fourteenth amendment right to procedural due process involves a dual inquiry: was he deprived of a protected property interest and, if so, was the deprivation accomplished without adherence to due process minimums? *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). As the Supreme Court there observed, "the hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause'." Id. at 430, 102

S.Ct. at 1155.[2] Findeisen's individual entitlement to continued employment as a public school teacher was grounded in Texas' tenure law for public school teachers. Section 13.107 of the Texas Education Code makes abundantly clear that a teacher with a continuing contract, such as Findeisen, can be discharged only "for lawful cause" or "because of necessary reduction of personnel."[3] Findeisen therefore had a constitutionally protected property interest in his continued employment by NEISD which could be terminated only in accordance with the recognized principles of due process, *i.e.*, adequate and timely notice and a meaningful opportunity to be heard. *See Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The second half of the inquiry requires more analysis. The core guarantee of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Prior to 1981, the Supreme Court consistently interpreted this due process guarantee to require that, except in "extraordinary situations where some valid governmental interest is at stake that justified postponing the hearing until after the event," *Board of Regents v. Roth*, 408 U.S. at 570 n. 7, 92 S.Ct. at 2705 n. 7, some form of hearing must be provided before an individual can be finally deprived of a

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[2]In its now classic definition of property within the meaning of the due process clause of the fourteenth amendment, the Supreme Court stated:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

[3]The Texas statute provides further that, before a tenured teacher shall be dismissed for cause, the school district's board of trustees shall notify the teacher in writing of the charges against him and shall provide the teacher with an opportunity to be heard at an administrative hearing. Tex.Educ.Code Ann. § 13.111-12.

federally protected property interest. *See, e.g. Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). In the same vein, the Supreme Court held in *Perry v. Sindermann* that a tenured public school teacher could not be dismissed without notice of the precipitating charges and a pretermination administrative hearing at which the teacher was given the opportunity to challenge those charges. The Court recognized that the predeprivation notice and hearing were necessary prophylactics against a wrongful discharge.

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), necessitated a re-examination of this line of jurisprudence. In *Parratt* the Court concluded that due process did not necessarily mandate a predeprivation hearing when an available post-deprivation state tort remedy provided adequate redress. The post-deprivation tort remedy weighed into the due process calculus and no federally protected property interest, cognizable under § 1983, was implicated.[4]

The *Parratt* court carefully distinguished between situations in which "due process requires a predeprivation hearing before the State [may interfere] with any liberty or property interest" and situations in which "either the necessity of quick action by

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[4]In *Parratt*, a Nebraska state prisoner's hobby materials worth $23.50 were negligently mislaid by prison officials. Although the Supreme Court recognized that this negligent act constituted a deprivation of property under color of state law, the Court held that the prisoner had failed to allege a due process violation cognizable under § 1983 because the tort law of the State of Nebraska provided an adequate post-deprivation remedy. The Court thus held that Nebraska's common law provided the required "due process of law" for this deprivation of property and, therefore, that there had been no violation of the fourteenth amendment.

the State or the impracticability of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time ater the initial taking, satisfy the requirements of procedural due process." 451 U.S. at 537, 540, 101 S.Ct. at 1914-1915. Four factors are discernible. First, if the deprivation of the property interest is authorized by established state procedures, a predeprivation hearing is essential to ensure conformity with those procedures. 451 U.S. at 538, 101 S.Ct. at 1914. Second, the requirement of a predeprivation hearing is directly related to the impact of the deprivation on the party's livelihood. *Id. See Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Third, the imperative of quick action by the state is a weighty consideration. 451 U.S. at 538-39, 101 S.Ct. at 1914-15. As a marked example, in *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908), the Court upheld the right of a state to seize and destroy a shipment of rotten food without delaying for a preseizure hearing. The state's interest in immediately responding to a perceived public health emergency outweighed the danger of erroneous destruction of property. Finally, the imperative of a predeprivation hearing wanes when impractical, as in a negligent tort situation, particularly when the state provides an adequate post-deprivation tort remedy. *Parratt* fit particularly well into this fourth area. The act complained of there was tortious; it was the result of a negligent act, neither programmed specifically nor the product of systemic default. In *Logan*, the Court capsulated the *Parratt* factors and observed that "absent the necessity of quick action by the State or the impracticality of providing any predeprivation process, a post-deprivation hearing [is] constitutionally inadequate."[5]

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[5]It has been suggested that *Parratt*, by making the availability of a state tort remedy relevant to the viability of a § 1983 claim, subverts the *Monroe v. Pape* rule that § 1983 provides a ready remedy for all due process violations

Applying these four elements or factors to the case at bar, we conclude and hold that Findeisen's alleged constructive discharge claim sets forth the type of deprivation of property for which due process requires a predeprivation hearing. First, Texas law sets forth the substantive and procedural requirements for dismissal of a tenured teacher. A pretermination hearing is essential to assure that the state's statutory guidelines are followed. Second, the action affects Findeisen's professional standing and livelihood. The termination of a tenured public school teacher adversely impacts on the teacher's personal and professional standing in both the educational community and the greater societal community. Findeisen's claim is not for a few dollars worth of hobby goods which were negligently lost; it involves his career. Third, there was no necessity for hasty action; no emergency existed. Far from the threat occasioned by the corrupt food in *North American Cold Storage Co.*, this record does not even reflect a situation in which a student or teacher was threatening to disrupt the orderly educational processes. *Cf. Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Finally, absent the occasional emergency, a school board can easily hold a meaningful predeprivation hearing to properly consider whether to discharge a tenured teacher. What might be considered a pressing concern may be handled by the simple expedient of a leave of absence pending a reasonably scheduled hearing. There is not the semblance of impracticability of such a hearing reflected in the record before us, nor is any suggested.

In summation then, one threatened with the deprivation, under color of state law, of a federally protected property interest must be given "an opportunity . . . at a meaningful time

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regardless of the availabilty of a state tort remedy. We do not agree. *Parratt* merely limits the group of claims that *allege* procedural due process violations; once a bona fide procedural due process claim is asserted, the *Monroe v. Pape* rule applies. If the post-deprivation state tort remedy is inadequate under *Parratt* to constitute "due process of law," then *Monroe v. Pape* permits the person deprived of property to proceed under § 1983 without reference to the state tort remedy.

and in a meaningful . . . manner for [a] hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 437, 102 S.Ct. at 1158. Where the property interest is the employment of a tenured public school teacher the teacher must be provided timely notice and an opportunity to answer charges so as to minimize the likelihood of an erroneous discharge. In the context of the discharge of a tenured public school teacher, we perceive no *Parratt*-directed change in the essential teachings of *Roth*, *Sindermann*[6] and their progency.

SUMMARY JUDGEMENT

Rule 56 of the Federal Rules of Civil Procedure provides that a proper motion for summary judgment shall be granted forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). As designed, summary judgment is a potent weapon, but "courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967). Summary judgment is appropriate only where no genuine issue of material fact exists. The moving party bears the burden of proof in that regard and any doubt as to the existence of a disputed fact must be resolved against the moving party. *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406 (5th Cir. 1980). Courts should be particularly circumspect where, as here, the case is scheduled for trial by jury.

A review of the record quickly discloses several genuine issues of fact which are material to Findeisen's constructive discharge claim. The pre-trial order specifically lists a dozen

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[6]The district court opined in granting the motion for summary judgment that "the Courts of the State of Texas provide full and due process for plaintiff's breach of contract claim." Because of our disposition of the *Parratt* issue, we do not decide whether *Parratt* has any application to a situation where the post-deprivation state common law remedy that purportedly constitutes "due process of law" is an action in contract rather than in tort.

contested issues of fact including: (1) whether a NEISD official warned Findeisen that filing a grievance to challenge his transfer to Garner Middle School would jeopardize his teaching position; (2) whether the NEISD personnel director threatened to terminate Findeisen if Findeisen failed to submit the August 19, 1981 contingent resignation; (3) whether Findeisen told the principal of Wood Middle School that he was interested only in a high school position; and (4) whether a NEISD official assured Findeisen that NEISD would exhaust the supply of available teachers within its internal pool before hiring outside the system. The trial court inappropriately intruded upon the function of the factfinder, here a jury, by granting NEISD's motion for summary judgment. In so concluding we intimate no suggestion as to the adequacy or validity of Findeisen's claim of constructive discharge. That initial decision belongs first to the trial court and jury.

The summary judgment in VACATED and matter is REMANDED for further proceedings.

GARWOOD, Circuit Judge, concurring.

I concur. The present summary judgment record does not entirely exclude the possibility that plaintiff's resignation was procured and accepted by the District essentially in bad faith and under false pretenses in order to terminate his employment for disciplinary-type reasons that would otherwise require a hearing for such a tenured teacher. Were that the situation, more than an ordinary breach of contract[1] would arguably be involved and present decisional law would seemingly entitle plaintiff to relief under section 1983.

I am moved to say, however, that to the extent this result is based solely on the lack of "predeprivation" procedures, it appears to me to be most regrettable. There is here no claimed

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[1] *Cf. Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983); *Vail v. Board of Education of Paris Union School District No. 95*, 706 F.2d 1435, 1449 (7th Cir. 1983) (dissenting opinion), *affirmed by an equally divided court*, ____ U.S. ____, 104 S.Ct. 2144, 80 L.Ed.2d 377 (1984).

invation of any substantive constitutional right. Nor is any liberty or reputational interest implicated. *See Campos v. Guil'ot*, 743 F.2d 1123 (5th Cir. 1984). We are dealing only with the adquacy of state procedures to protect property. If, as may indeed be the case here, wholly adequate and previously well established state procedures exist under which the School District's actions may be subsequently challenged "*de novo*" and full recovery had for any economic loss, it is difficult for me to see why other process should be constitutionally due for the protection of this character of "property." This is the type of protection which the law has traditionally given for the vindication of the "property" rights of a private employee whose status is protected by a long-term employment contract. The implicit judgment has been that this is sufficient and appropriate.[2] The tenured employment relationship lacks the possessory and transferability rights the invasion of which may enhance the importance of predeprivation process in respect to other kinds of property. We recognize that the School District may employ the expedient of a leave of absence, presumably with pay, before affording process. By requiring "pre-deprivation" process, then, we are essentially protecting no more than the continuation of compensation pending resolution of the dispute, in preference to subsequent recovery under established procedures of back pay with interest and other appropriate damages and relief. That protection of this special, predeprivation kind is constitutionally required across the board for all

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[2]Of course, the due process clause operates on states, not private employers, but the present question is not whether due process is required, but rather what character of process is due. The private analogy is instructive as we deal here with state action in a proprietary, rather than a sovereign or governmental, capacity. It is difficult to understand why what has long been regarded as sufficient process to fairly protect the employment property rights of the tenured chief engineer at the local private junior college is insufficient to similarly protect the same rights of his counterpart at a comparable public institution.

state employees with any type of tenure or employment contract seems unrealistic and not in keeping with our traditional expectations and understandings.[3] In this context, the strict "predeprivation" rule will also frequently result in holding unconstitutional systems which *in fact* provide *more* due process protection for this character of property right than that deemed sufficient under the predeprivation jurisprudence. These anomalies, however, appear sufficiently enmeshed in the current tangled web of the jurisprudence on this subject as to be beyond attempted amelioration by a panel of this Court.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1609

D. C. Docket No. SA-82-CA-470

CHARLES FINDEISEN,
Plaintiff-Appellant

v.

NORTH EAST INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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Before POLITZ, WILLIAMS AND GARWOOD, Circuit Judges.

FILED
February 11, 1985
Charles W. Wagner, clerk

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

December 26, 1984

GARWOOD, Circuit Judge, concurring.

ISSUED AS MANDATE: Feb. 4, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1609

CHARLES FINDEISEN,
Plaintiff-Appellant,

VERSUS

NORTH EAST INDEPENDENT SCHOOL DISTRICT, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING
(January 23, 1985)

FILED
U.S. Court of Appeals
January 23, 1985
Gilbert F. Ganucheau, clerk

Before POLITZ, WILLIAMS AND GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge